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Maurice Rosenberg

Warren R. King

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# Curbing Discovery Abuse in Civil Litigation: Enough is Enough\*

*Maurice Rosenberg\*\**

*Warren R. King\*\*\**

## I. INTRODUCTION

Recent years have witnessed a torrent of criticism of the practice of pretrial discovery in federal litigation. The outcry was significantly amplified by the Pound Conference, convened in St. Paul, Minnesota, in 1976. Among the conclusions prompted by the Conference was this one:

There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.<sup>1</sup>

In response to this concern, the American Bar Association appointed the Special Committee for the Study of Discovery Abuse to make recommendations for the control of improper discovery practices. In late 1977 the Special Committee ad-

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\* Points of view or opinions expressed in this Article are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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\*\* Harold R. Medina Professor of Procedural Jurisprudence, Columbia University; A.B., 1940, Syracuse University; LL.B., 1947, Columbia University; at the time this article was written, Assistant Attorney General, U.S. Department of Justice, Office for Improvements in the Administration of Justice.

\*\*\* Associate Judge, Superior Court of the District of Columbia; B.A.E., 1960, Rensselaer Polytechnic Institute; J.D., 1967, American University, Washington College of Law; LL.M., 1969, Yale University Law School; at the time this article was written, Attorney Advisor, U.S. Department of Justice, Office for Improvements in the Administration of Justice.

1. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

vanced a group of proposals for consideration by the Advisory Committee on Civil Rules of the Judicial Conference of the United States. The Advisory Committee adopted some of the proposals and circulated a draft report for public comment.<sup>2</sup> After hearings and considerable debate, the Advisory Committee issued a revised report in February 1979<sup>3</sup> that dropped several of the bar committee's proposals, including restrictions on the permitted scope of discovery and limitations on the number of interrogatories a party could serve without a court order.

In April 1980 the Supreme Court promulgated amendments to the federal discovery rules<sup>4</sup> which did not include either the restrictions on the scope of discovery or the limitations on the number of interrogatories. Mr. Justice Powell, joined by two other Justices, dissented from the promulgation of the amended rules, criticizing as "inadequate" the package that had been promulgated and expressing concern that significant reform would be delayed for ten years by the "tinkering" changes.<sup>5</sup> His dissent warned that without substantial improvement "the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs."<sup>6</sup>

The 1980 amendments have not quieted the unrest in the bar about federal discovery practice. The ABA's Special Committee has returned to the fray by advancing several additional proposals and urging them upon the Advisory Committee on Civil Rules. In addition, discovery-related research has been conducted by the Federal Judicial Center,<sup>7</sup> the Office for Improvements in the Administration of Justice (OIAJ) of the Department of Justice,<sup>8</sup> and the National Commission for the Re-

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2. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613 (1978).

3. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979).

4. 446 U.S. 997 (1980).

5. *Id.* at 998, 1000 (Powell, J., dissenting).

6. *Id.* at 1000-01.

7. See P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY* (Federal Judicial Center 1978).

8. See C. Ellington, *A Study of Sanctions for Discovery Abuse* (May 11, 1979) (report submitted to the Office for Improvements in the Administration of Justice, United States Department of Justice).

view of Antitrust Laws and Procedures.<sup>9</sup> In late 1978 Judge Mary M. Schroeder and John P. Frank, with support from OIAJ, organized a conference of about twenty discovery specialists at the Arizona State University Law School. The meeting resulted in an influential report arguing against the Special Committee's proposed limitations on the scope of discovery and the number of interrogatories.<sup>10</sup> A follow-up conference, under OIAJ auspices, was held at the Department of Justice in August 1980 with a similar group of conferees. At the two meetings there was a rough but clear consensus that the time had arrived for a significant reevaluation of the entire process of pretrial discovery. There was a widespread sense of uneasiness about the system as it presently functions.

Underlying the disquiet about federal discovery practice are growing doubts about two basic premises of the pretrial discovery system adopted for the federal courts in 1938. One challenged premise is that in the discovery practice "more is better." This theme was written into the rules in 1938 and in 1947 received a vigorous endorsement from the Supreme Court in its celebrated decision in *Hickman v. Taylor*.<sup>11</sup>

Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.<sup>12</sup>

The second premise that has come under increasing attack is that discovery does not need judicial attention because lawyers will practice it under a rule of reason reinforced by mutual self-interest in avoiding the waste of their time or their clients' money which results when unnecessary pursuit or resistance in the discovery process occurs. This view holds that discovery practice should be a self-regulating affair with judges remaining aloof and uninvolved except in those rare situations that lawyers find themselves unable to resolve on their own.

Even though the widespread cries of "discovery abuse" are not explicitly phrased as challenges to the "more is better" and

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9. NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979).

10. REPORT OF ARIZONA STATE UNIVERSITY DISCOVERY CONFERENCE ON THE ADVISORY COMMITTEE'S PROPOSED REVISION OF THE RULES OF CIVIL PROCEDURE (DISCOVERY) (Nov. 1978) [hereinafter cited as REPORT ARIZ. DISCOVERY CONF.]; See 1978 ARIZ. ST. L.J. 494.

11. 329 U.S. 495 (1947).

12. *Id.* at 507.

"judges not needed" premises of federal discovery practice, that is what they seem to be. The implication of the federal rules and court decisions, that the more discovery the better, is fortified by the provision in Rule 26(a) that "the frequency of use of these methods is not limited" unless the court finds reason to restrict it by issuing a protective order under Rule 26(c) "for good cause shown." The causes warranting issuance of protective orders do not include the repetitiveness, redundancy, or nonnecessity of discovery of the type or from the source in question. Nor do they include any indication that the court should confine discovery to an amount proportionate to the issues or values at stake in the litigation. A reaction against the wide-open repetitive kind of excesses in discovery practice may be one reason for the hue and cry about "abuse."

The other premise of the rule—that discovery could be regulated by the lawyers themselves—was formulated without taking into account the steady change in the last generation in the method employed by lawyers to fix their fees. This change has been characterized by a movement toward the practice of billing by the hour or fraction.<sup>13</sup> In a period of rising affluence and rampant litigiousness, lawyers have experienced a pleasing convergence of two strong motivations: their professional urge to leave no stone unturned in preparing the case through pretrial discovery, and their economic interest in increasing the number of billable hours they devote to the case. A "discovery industry" has arisen—a vocation that appears to be self-justifying if not self-regulating. That is, in cases that can tolerate it, discovery is an end in itself, without much reference to whether the incremental value of discovered materials is at least equal to the cost in energy and fees of getting them.<sup>14</sup>

This Article reviews the discovery rule changes proposed by the ABA's Special Committee and others, evaluates the proposals in light of available research and the opposition that has been raised to them, and examines alternatives that we believe are more responsive to the fundamental problems of discovery. In short, we confront directly the theories that "more is better"

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13. See, e.g., Darby, *It's About Time: A Survey of Lawyers' Timekeeping Practices*, 4 LEGAL ECON. 39 (1978); Laumann & Heinz, *The Organization of Lawyers' Work: Size, Intensity, and Co-Practice of the Fields of Law*, 1979 AM. B. FOUNDATION RESEARCH J. 217.

14. See Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907 (1980).

and that "judges are not needed" because discovery should be regulated by the lawyers themselves.

## II. THE SPECIAL COMMITTEE'S DISCOVERY PROPOSALS

### A. *The 1977 Proposals: Limiting the Scope of Discovery and the Number of Interrogatories*

In 1977 the Special Committee issued a report that recommended amendments to a number of Federal Rules of Civil Procedure, including several of the rules governing pretrial discovery.<sup>15</sup> Appropriate committees of the Judicial Conference considered the report, solicited comment, conducted public hearings, and eventually recommended a set of amendments which, on April 29, 1980, were promulgated by the Supreme Court and, encountering no opposition from Congress, became effective August 1, 1980.<sup>16</sup> Measured against the amendments that actually went into effect, the Special Committee's discovery proposals achieved mixed success.

Two of the most significant and controversial proposals made by the Special Committee, but not adopted by the Judicial Conference, were (1) a revision of the scope of discovery permitted by Rule 26(b) (the phrase "relevant to the subject matter" of the action would become "relevant to the issues raised by the claims or defenses of any party") and (2) a revision limiting to thirty the number of interrogatories that could be served without court approval. Both proposals met with strong opposition from the bench and bar.

The objections to the scope-narrowing proposal were summarized by Judge Mary M. Schroeder and John P. Frank,<sup>17</sup> who argued that it would likely wipe out notice pleading,<sup>18</sup> would be ineffective in the face of the rule permitting liberal amendments to pleadings,<sup>19</sup> and would prompt a new round of litigation as to the meaning of the terms employed in the proposed amendment.<sup>20</sup> On the basis of a review of reported cases and a number

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15. AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977).

16. 446 U.S. 997 (1980).

17. Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475.

18. *Id.* at 486. See also Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267 (1978).

19. Schroeder & Frank, *supra* note 17, at 481-90.

20. *Id.* at 480-81.

of interviews with attorneys, they concluded that the scope-narrowing proposals would reduce discovery in very few, if any, cases.<sup>21</sup>

The Special Committee had generally conceded drawbacks in its proposal but insisted the changes were necessary to send a message to the courts not to err "on the side of expansive discovery."<sup>22</sup> Schroeder and Frank did not question the need for sending a message; they simply concluded that the proposal would deliver the wrong message to the wrong place.<sup>23</sup>

Schroeder and Frank also summarized objections to the proposal to limit the numbers of interrogatories a party may serve without court approval, making the point that fixed and arbitrary limits are often inappropriate because cases vary widely in their needs.<sup>24</sup> Fifty interrogatories may be excessive in some cases and wholly insufficient in others. Further, they feared that courts may be called upon to squander time and energy considering applications to enlarge the number of interrogatories that can be served and determining whether a particular question constitutes a single interrogatory or more than one.<sup>25</sup>

Opposition to this proposal has also been based on the argument that excessive interrogatories are only part of the problem: for example, unnecessarily lengthy and numerous depositions can be as objectionable as interrogatories and are often more expensive to the parties.<sup>26</sup> In addition it has been argued that any limitation on the number of interrogatories that can be served without court supervision may unfairly discriminate against litigants with modest means who often rely upon interrogatories as their principal or sole means of obtaining discovery.<sup>27</sup>

### *B. The 1980 Proposals: Assuring Stricter Compliance*

In early 1980 the Special Committee issued a second set of proposals to amend the discovery rules.<sup>28</sup> Included were the major ones earlier rejected by the Advisory Committee—the scope-

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21. *Id.* at 479-80.

22. AMERICAN BAR ASSOCIATION, *supra* note 15, at 3.

23. Schroeder & Frank, *supra* note 17, at 480.

24. *Id.* at 487.

25. *Id.*

26. Minutes of Conference on Improving Pretrial Discovery 2 (August 28, 1980).

27. *Id.*

28. AMERICAN BAR ASSOCIATION, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (Jan. 1980) [hereinafter cited as ABA REPORT No. 2].

narrowing proposal and the limitation on the number of interrogatories that may be served without court approval. In addition, the Special Committee proposed a new subsection designed to induce stricter compliance with specific limitations and generally to curb disproportionate pushing, tripping or overdoing in discovery practice.<sup>29</sup>

The approach in the new subsection was patterned after Rule 11, which provides that an attorney's signature on a pleading constitutes a certificate that the pleading is well founded and bona fide. Specifically, the Special Committee's proposal is that in submitting a discovery request, objection, motion or opposition, the attorney's signature should constitute

a certificate by him that he has read the request, objection, motion or opposition; that to the best of his knowledge and belief the request, objection, motion or opposition is made in good faith and is not *unreasonably annoying, embarrassing or oppressive or unduly burdensome or unduly expensive* [given the nature and complexity of the case, the amount in controversy or other values at stake in the litigation, and the discovery, if any, which has already been had;] and is not interposed for delay.<sup>30</sup>

The italicized words track the language in present Rule 26(c), prescribing the grounds for issuance of a protective order, but add the modifier "unreasonably." The bracketed material is new and enlarges existing obligations.<sup>31</sup> Many courts would not, under current practice, issue protective orders in the circumstances covered by the new language.<sup>32</sup> In introducing the concept of proportionality and calling attention to discovery already had, the proposal undercuts the "more is better" theme and the "frequency . . . is not limited"<sup>33</sup> directive.

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29. *Id.* at 11.

30. *Id.* (emphasis and brackets added).

31. The language following the bracketed material is borrowed from present Rule 11.

32. That is not universally so, however. A few courts have held that discovery that is disproportionate, cumulative, duplicative, available from another source, or obtainable by some other discovery device can be limited by the issuance of a protective order. See *Walker v. United Parcel Servs.*, 87 F.R.D. 360 (E.D. Pa. 1980) (plaintiff denied opportunity to depose a witness on grounds that deposition would be largely duplicative); *In re United States Financial Sec. Litigation*, 74 F.R.D. 497, 498 (S.D. Cal. 1975) ("interrogatories must be tailored to discover only what is reasonable and necessary to the litigation at hand"); *Frost v. Williams*, 46 F.R.D. 484 (D. Md. 1969) (two hundred interrogatories found to be oppressive in case involving ordinary rear-end collision).

33. FED. R. CIV. P. 26(a).



### III. THE NATURE OF THE PROBLEM AND ITS SOLUTION

#### A. *The Special Committee's View of the Problem*

We submit that the Special Committee's effort to curb "overdiscovery" by narrowing the breadth of discovery misperceives the problem in its most usual form. It is probably true that some discovery may seem excessive to a responding party or to a court because it appears to reach beyond the issues, subject matter, or claims and defenses fairly raised or presented in the case as made by the pleadings.<sup>34</sup> But it is also true that very often when discovery is viewed as excessive by responding parties and courts it is so regarded not because it is irrelevant to issues in the case but because, even though relevant, it is duplicative, redundant, or simply disproportionately costly in relation to the values at stake in the litigation.<sup>35</sup> In short, much of the truly abusive discovery that occurs is discovery that is too deep rather than too broad.

If that point is sound, discovery improvement efforts should be directed not toward narrowing the definition of what is relevant, but rather toward protecting responding parties from redundant, duplicative and "disproportionate" discovery by reducing the number of inquiries that may be made concerning matters otherwise properly subject to discovery.

Such a reduction might be accomplished through more frequent use of protective orders under Rule 26(c).<sup>36</sup> As presently cast, Rule 26(c) permits a judge to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."<sup>37</sup> Surveys of reported cases<sup>38</sup> and available empirical evidence<sup>39</sup>

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34. On the other hand, Schroeder and Frank maintain that such instances are extremely rare. *Supra* note 17, at 479-80.

35. Note 26 *supra*.

36. This suggestion was originally made in a working paper prepared for the November, 1978, Arizona State Conference. REPORT ARIZ. DISCOVERY CONF., *supra* note 10, at 3 n.1.

37. FED. R. CIV. P. 26(c).

38. Roesberg v. Johns-Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980); Dykes v. Morris, 85 F.R.D. 373 (N.D. Ill. 1980); Petruska v. Johns-Manville, 83 F.R.D. 32 (E.D. Pa. 1979); United States v. I.B.M. Corp., 453 F. Supp. 194 (S.D.N.Y. 1977); Kiblen v. Retail Credit Co., 76 F.R.D. 402 (E.D. Wash. 1977); Alexander v. Parsons, 75 F.R.D. 536 (W.D. Mich. 1977); Wright v. Patrolmen's Benevolent Ass'n, 72 F.R.D. 161 (S.D.N.Y. 1976); Anderson v. United Air Lines, Inc., 49 F.R.D. 144 (S.D.N.Y. 1969); Wirtz v. Capitol Air Serv., Inc., 42 F.R.D. 641 (D. Kan. 1967); Taylor v. Atchison, T. & S. Fe Ry., 33 F.R.D. 283 (W.D. Mo. 1962); Stonybrook Tenants Ass'n v. Alpert, 29 F.R.D. 165 (D. Conn.

disclose that trial courts are reluctant to restrict discovery on these grounds unless the moving party makes a strong showing of an enumerated kind of injury. Under prevailing law, if the objection to discovery is that it is disproportionate to the needs of the case, cumulative, duplicative or more readily available from another source, and no showing of extreme burden or hardship is made, courts are unlikely to issue protective orders. This is in line with the traditional "more is better" attitude that rests upon the *Hickman* canon that "[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation."<sup>40</sup>

### *B. Determining Whether Discovery is Excessive*

The acceptance of the traditional "more is better" attitude raises a number of questions with respect to what ought to be permitted in the discovery process:

1. Should a party who has essentially completed discovery in a particular area be permitted to subject an adversary to additional discovery requests related to the same general subject?<sup>41</sup>

2. Should a party be required to respond to an adversary's lengthy interrogatories shortly before the party is to be deposed by the adversary? Could not the same question be asked during the deposition, eliminating redundancy for both parties?<sup>42</sup> In some circumstances should discovery by interrogatories be required as more efficacious than depositions?

3. Should a party be required to respond to a discovery re-

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1961); *B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co.*, 24 F.R.D. 1 (S.D. Tex. 1959); *Hornung v. Eastern Auto. Forwarding Co.*, 11 F.R.D. 300 (N.D. Ohio 1951).

39. The Federal Judicial Center has found:

[T]here is support for the view that judges generally accord great deference to the liberality of the discovery rules. Though rulings on protecting motions tend to favor the moving party, the tendency is not nearly so strong as that in rulings on compelling motions directed to substance. Judges . . . overwhelmingly permit requesting parties to compel discovery, but are far less likely to permit requesting parties to block discovery.

P. CONNOLLY, *supra* note 7, at 107 (footnote omitted).

40. 329 U.S. at 507.

41. In *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y. 1971), the court would not permit additional discovery. The court emphasized that it had a special duty to restrict discovery of this character because the case was of a complex nature. It is not clear how the court would have ruled if the case had not been a complex one or if the stakes involved had been substantially less.

42. See *Fishman v. A.H. Riise Gift Shop, Inc.*, 68 F.R.D. 704 (D.V.I. 1975); *Boyden v. Troken*, 60 F.R.D. 625 (N.D. Ill. 1973).

quest when it can be established that the requester has already received the information in another manner or from a different source, or that the information is more readily available from another source?<sup>43</sup>

4. Could discovery be limited without unduly prejudicing the rights of parties when the material sought to be discovered can be readily obtained by another, less burdensome method?<sup>44</sup>

5. Should a party be required to respond to interrogatories when that party has been previously deposed on the same area covered in the interrogatory?<sup>45</sup>

Although none of these questions can be answered easily and categorically in the abstract, the reduction of unnecessary duplication and repetition is certainly a worthwhile goal. It might seem that under the current rule courts are authorized to issue protective orders to achieve that goal in the circumstances described in the five questions posed above. In practice this generally does not happen. Usually courts have been reluctant to issue protective orders except in the most compelling circumstances.<sup>46</sup>

#### IV. A PROPOSAL TO LIMIT THE DEPTH OF DISCOVERY

To effect the change in practice needed to reduce unnecessary duplication and repetition in discovery, Rule 26(c) should be amended to specify that protection is to be afforded not only against discovery that causes "unreasonable annoyance, embarrassment, oppression, or undue burden or expense," but also against discovery that is duplicative and cumulative or out of proportion to the needs of the particular case. By broadening the grounds for the issuance of such orders, and by emphasizing the need for reducing duplication and repetition, Rule 26(c) might encourage trial judges to be more diligent in preventing needless discovery.

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43. See *Lenard v. Greenville Mun. Separate School Dist.*, 75 F.R.D. 448 (N.D. Miss. 1977); *Apco Oil Corp. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D. Mo. 1969); *United States v. Procter & Gamble Co.*, 25 F.R.D. 252 (D.N.J. 1960).

44. For example, a party to whom interrogatories are addressed may be willing to stipulate or admit the relevant underlying facts. Compare *Quaker Chair Corp. v. Litton Business Sys., Inc.*, 71 F.R.D. 527 (S.D.N.Y. 1976) with *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975).

45. This issue can arise when counsel, due to oversight, negligence, or incompetence, has failed to make the appropriate inquiries during a deposition and then seeks to cover the omissions by interrogatories.

46. See note 38 *supra*.

The likely result of the adoption of this proposal would be greater judicial involvement in the discovery process—an infringement of a general premise of the federal rules as originally drawn and of the specific intention of the 1970 amendments that discovery should operate outside the court and be self-regulating. That hope simply has not been realized due to a variety of factors: the desire of lawyers (and parties) for delay; lawyer billing practices which create incentives to enlarge rather than minimize time spent; the widespread notion that discovery is an end in itself rather than a means of facilitating judgment;<sup>47</sup> the normal effects of human inertia abetted by absence of deadlines or authoritative prodding; and the conflict between the adversarial system on one hand and a process that depends upon cooperation for its success on the other.<sup>48</sup> As a result, the current trend of thinking is that greater judicial involvement, not less, is essential to reduce problems of discovery abuse. Professor Wayne D. Brazil, in a recent report on the discovery practice of the Chicago Bar, concluded: "The generalization that emerges from the numerous vocal complaints about judicial attitudes is that to a great many attorneys judges appear to believe that discovery disputes simply do not belong in the courtrooms. Many lawyers deeply resent this attitude."<sup>49</sup> This view paralleled the finding of the Federal Judicial Center in its 1978 report on discovery practices that effective control of discovery depends upon judicial management.<sup>50</sup>

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47. In a recent article, Martin Kaminsky noted:

The discovery process has become, for both sides, a litigation weapon to discourage and prevent prosecution of claims, to force a settlement or merely to wear down an adversary. Counsel, regrettably, often look upon discovery as a meal ticket or annuity rather than as a quick and inexpensive quest for evidence. These were obviously not the intentions of the draftsmen of the Federal Rules of Civil Procedure, and should not be permitted to thwart the right of litigants to their day in court.

Kaminsky, *supra* note 14, at 922 (1980) (footnotes omitted). See also Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978). In his concurring opinion in *Herbert v. Lando*, 441 U.S. 153, 179 (1979), Justice Powell wrote that "discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice."

48. See Brazil, *Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUNDATION RESEARCH J. 219.

49. *Id.* at 246.

50. P. CONNOLLY, *supra* note 7, at 77.

*A. Amending Rule 26(c) to Consider Proportionality*

If greater court involvement is necessarily the wave of the future, one method of accomplishing it is to strengthen the hand of the trial judges to control discovery by broadening their power to issue protective orders. Such a proposal was recommended by the Arizona State conference<sup>51</sup> but was never acted upon by the Judicial Conference. A redraft of Rule 26(c) incorporating the principle is provided in Appendix I.

This amendment would authorize trial judges to exercise control by ensuring that the discovery sought is not out of proportion to the needs of the case. Taking into account factors of redundancy and proportionality, a court could limit the number of depositions or interrogatories, or impose whatever other limits it concluded were necessary, to confine discovery efforts to those reasonably calculated to yield benefits that are worth the costs. This approach, geared to the circumstances of the case, is more promising than one that sets arbitrary numerical limits or that assumes that fluid concepts such as "relevant to the issues raised by the claims or defenses" can provide clear boundaries or send intelligible messages to the bench and bar.

*B. Amending Rule 26(a) to Encourage Discovery Limitations*

If Rule 26(c) is amended as proposed, the courts will clearly possess the power to curb excessive discovery and will be encouraged to do so. The message will be: Discovery is useful, but it must not be used to the point of abuse. To avoid diluting the message by flashing a contradictory signal, Rule 26(a) should be amended to drop the statement that "the frequency of use of [discovery] methods is not limited."

The first of two possible amendments to subsection (a) would directly parallel the provisions of proposed Rule 26(c) by providing that discovery be limited to that which is "commensurate in cost and duration with the needs of the case, the resources reasonably expected to be available to the parties or persons involved and the substantiality of the issues."<sup>52</sup> This

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51. REPORT ARIZ. DISCOVERY CONF., *supra* note 10, at 9; Schroeder & Frank, *supra* note 17, at 498.

52. See Appendix I. This provision would allow the court to take into account the need of parties with limited resources to opt for less expensive discovery methods. Such a party might, for example, be permitted to file more interrogatories than ordinarily necessary because of insufficient resources to develop the case by more expensive discovery

approach would make it unmistakably clear that too much discovery, even on relevant subjects, is not acceptable. This formulation would convey a realization that there are times when discovery must be limited even if the effect may be to preclude uncovering evidence or leads to evidence that might conceivably aid the presentation of the case. Not every incremental bit of information is worth the trouble and expense of obtaining it. The discovering side will insist it is, but, in a proper case, the other side is entitled to a determination that it is not worth the trouble.

The second possible amendment would be a simple provision in Rule 26(a) allowing the court to limit the frequency of discovery pursuant to the provisions of Rule 26(c).<sup>53</sup>

Adoption of these proposals would harmonize the sections of Rule 26 that set explicit limits on discovery (subsections (a) and (b)) with the provisions that empower the courts to issue protective orders to ensure that discovery is properly confined (subsection (c)). These amendments would also aid the trial court in the exercise of its recently enacted authority to set "limitations on discovery" under the discovery conference provisions of new Rule 26(f).

### *C. Eliminating the Need for Additional Attorney Certification*

If the proposed amendments to Rule 26(a) and (c) are adopted, the Special Committee's attorney certification proposal may be unnecessary. Disproportionate, cumulative, and duplicative discovery will be curbed or controllable pursuant to Rules 26(a) and (c). The sanctions provided in Rules 26 and 37 should be adequate to deal with any discovery activities that go beyond those barriers.

A case can be made for including a certification requirement in the rules to serve as an early warning that the purpose of the discovery process is to gain information—not to cause delay, increase expense, wear down opponents, force settlement, or discourage meritorious claims or defenses—and that discovery

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devices such as depositions. In addition, this provision would allow the court to curtail discovery in circumstances where it is apparent that a party with significant resources is using the discovery process to wear down a financially weaker adversary, either to discourage meritorious claims or defenses or to force unwanted settlements. See Kaminisky, *supra* note 14, at 922.

53. See Appendix II.

must not be pushed to excess. If this case persuades the rulemakers, a certification provision, using essentially the same language as that contained in the proposed amendment to Rule 26(c), could be adopted to serve that purpose.

In its latest proposal the Advisory Committee on Civil Rules has chosen a different method to combat disproportionate and repetitive discovery—*viz.*, by inserting in Rule 26(b) a new paragraph that spells out excess-avoiding limits on otherwise permissible discovery.<sup>54</sup> We strongly endorse that approach, which was one of the options we recommended to the Advisory Committee in an earlier draft of this paper.

## V. CONCLUSION

There has been widespread criticism in recent years of the undue expense and burden of the civil discovery process. It is argued that discovery has gotten out of hand because two fundamental and long-standing premises of the civil litigation process have not been subjected to sufficiently critical scrutiny in light of present circumstances. One premise, which was elevated to high principle in *Hickman v. Taylor*,<sup>55</sup> holds that a party is entitled to know everything there is to know about the opposition's case. The second premise is that court involvement in the discovery process should be exceptional; the norm was to be lawyer-regulation, with self-interest assuring good behavior. In an earlier day when cases were fewer, litigation less complex, and attorney motivations perhaps different, these premises may have been sound. We submit that they are no longer reliable premises and that this new reality must be faced squarely in amending the rules.

The proposals advanced here attempt to do this. They would restrain discovery not solely on the basis of relevancy, privilege, or whether the discovery sought would be annoying, embarrassing, oppressive, unduly burdensome, or unduly expensive, but also on the basis of whether the discovery requested avoids excesses of redundancy and disproportionality. Guides to these concepts would be provided in the rules and would be applied in light of the circumstances of the case. Necessarily, our

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54. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 90 F.R.D. 451, 479 (1981).

55. 329 U.S. 495 (1947).

proposals contemplate a greater involvement of judges in the discovery process in an effort to assure that permitted discovery will not be carried to excess.



## APPENDIX I

*Proposed Amendment to Fed. R. Civ. P. 26(c)*

(c) *Protective Orders and Other Limits on Discovery.* The court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may *sua sponte*; upon motion by a party or by the person from whom discovery is sought, and upon good cause shown; or *in conjunction with any conference conducted pursuant to these rules* make an order which justice requires if the court finds it necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense or *if the court finds that the discovery sought is cumulative or duplicative; obtainable from some other source which is either more convenient, less burdensome or less expensive; or, that the party seeking discovery has previously had ample opportunity to obtain the information sought. In entering a protective order pursuant to this subsection, the court shall ensure that the discovery allowed is commensurate in cost and duration with the needs of the case, the resources reasonably expected to be available to the parties or persons involved, and the substantiality of the issues. A protective order issued pursuant to this subsection should include one or more of the following:* (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

## APPENDIX II

*Proposed amendment to Fed. R. Civ. P. 26(a)*

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. [Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited].

The bracketed material would be deleted and the following provision substituted:

The frequency of use of these methods may be limited by the court, incident to any conference conducted in accordance with these rules, on motion for a protective order pursuant to Rule 26(c), or on its own initiative to ensure that the discovery sought is commensurate in cost, duration, and frequency with the needs of the case, the resources reasonably expected to be available to the parties or persons involved and the substantiality of the issues.

As an alternative, the bracketed material should be deleted and the following substituted: "*The frequency of use of these methods may be limited by the court pursuant to subsection (c) of this rule.*"